

1982 WL 189405 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

August 24, 1982

*1 The Honorable Alex Harvin, III
Assistant Majority Leader
Post Office Box 266
Summerton, South Carolina 29148

Dear Representative Harvin:

You have asked the opinion of this Office on whether South Carolina Department of Mental Health Directive No. 361-75 [copy attached] could be validly applied to prevent an employee of the Department from offering for election to a county council. Your question focuses on the provision in the Directive which provides that an employee who offers for election to a partisan political office can be removed from his position. As you are aware, membership on a county council is a partisan political office.

Because many of its employees are covered by [Sections 1501 to 1503 of Title 5 of the United States Code](#), which restricts to some extent the political activities of state and local governmental employees whose principal employment is connected with an activity funded by the United States,¹ the Department chose to apply the same basic restrictions to all of its employees through Directive No. 361-75. I understand the Department resolved that applying the same restrictions to all of its employees was the most equitable policy.

[Section 44-9-40, Code of Laws of South Carolina](#), 1976, provides that the State Commissioner of Mental Health 'shall have the power to appoint, and, in his discretion, remove all other officers and employees of the [Department], subject to the approval of the Mental Health Commission.' Section 44-9-100(4) empowers the Commission to adopt rules and regulations necessary for the operation of the Department's institution and facilities. Although the question is not free from doubt, the adoption of Directive No. 361-75 should be within the authority conferred by these statutes, or at least should be necessarily implied from or incidental to the powers conferred by them. See, [Beard-Laney, Inc. v. Darby](#), 213 S.C. 380, 389 (1948); [Piedmont & Northern Railway Co. v. Scott](#), 202 S.C. 207, 223-224 (1943).

In an opinion dated September 27, 1979, [copy attached] this Office concluded that a county ordinance similar to Directive No. 361-75, and which included a prohibition against county employees offering for election to county offices, did not violate the right to freedom of speech guaranteed by the First and Fourteenth Amendments to the United States Constitution and Article I, Section 2 of the South Carolina Constitution. That conclusion and the authority cited in support of it are applicable to Directive No. 361-75. Additional authority supporting the conclusion in that opinion and its application to your question also is found in [C.S.C. v. Letter Carriers](#), 413 U.S. 548 (1973); [United Public Workers of America v. Mitchell](#), 330 U.S. 75 (1947); Annotation, 44 A.L.R. Fed. 306, § 5[a]. Much of this same authority also holds or contains comments that such restrictions on governmental employees do not violate the due process and equal protection clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

*2 The question has been raised whether it is a violation of the equal protection provisions of the United States and South Carolina Constitutions for the employees of some State agencies, departments and institutions to be placed under such restrictions while the employees of others are not. There is authority which supports the conclusion that this situation is not such a violation. [Broaderick v. Oklahoma](#), 413 U.S. 601, 607 n. 5 (1973) [Not a violation where statutes placed restrictions on classified personnel but not unclassified personnel]; [Perry v. St. Pierre](#), 518 F.2d 184, 186 (1975) [Not a violation where an ordinance placed restrictions on police officers but not other municipal employees]. However, this Office is of the view that

the cited authority, though persuasive, may not necessarily be conclusive or binding on our situation or the equal protection provision in the South Carolina Constitution and believes that it is a matter ripe for treatment by appropriate legislation.

Based on the foregoing, it is the opinion of this Office that Department of Mental Health Directive No. 361-75, when applied to permit the removal from employment of an employee of the Department who offers for election to a county council, is valid. This Office also is of the view that the lack of uniformity among the State's agencies, departments and institutions concerning the political activities of their employees should be the subject of appropriate legislation.

Sincerely,

James M. Holly
Assistant Attorney General

Footnotes

- 1 As we advised you earlier, inquiries pertaining to the coverage of the Department's employees by these federal statutes should be directed to the United States Merit System Protection Board in Washington, D. C.

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